

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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In the Matter of:

Union Tank Car Company,

Respondent Employer,

and

INTERNATIONAL ASSOCIATION OF,  
SHEET METAL, AIR, RAIL, AND  
TRANSPORTATION WORKERS (SMART)

Charging Party Union,

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Case No.: 12-RC-221165

Case Nos.: 12-CA-210779  
12-CA-219374  
12-CA-220822  
12-CA-222661

**UNION TANK CAR COMPANY'S**  
**BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS**  
**TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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## **I. STATEMENT OF THE CASE**

### **A. Introduction**

On January 11, 2019, Administrative Law Judge Arthur J. Amchan (the “ALJ” or “ALJ Amchan”) issued his Decision in this combined representation and unfair labor practices case, concluding that Union Tank Car Company (“UTLX” or “Company”) violated Section 8(a)(1) of the Act in multiple respects. [JD-03-19].<sup>1</sup> In his Decision, ALJ Amchan erred in several ways.

First, he wrongly concluded that UTLX violated Section 8(a)(1) of the Act when a Supervisor by the name of Jody James removed a total of three (3) pieces of union literature from the employee break room. [ALJD 8:25-34]. Considering all the circumstances, this single incident cannot support a violation of Section 8(a)(1). The evidence showed that James did not discriminate against the union or have any anti-union animus when he removed the flyers from the break room.

Next, he erred in concluding that UTLX violated Section 8(a)(1) of the Act by maintaining a Use of Telephone rule that limited the times and places that employees could use their cellular telephones. [ALJD 7:30-8:4]. This rule is clearly lawful under the National Labor Relation Board’s (“Board”) analysis in *The Boeing Company*, 365 NLRB No. 154 (2017).

Lastly, ALJ Amchan made an erroneous factual finding that a UTLX Supervisor by the name of Graham Bridges told an hourly employee, Ridge Wallace, that if it were not for the Union, Wallace would have received a less severe disciplinary consequence after he had violated a Company policy mandating a 30-day suspension. [ALJD 5:23-30].

For these reasons, as explained in greater detail in this Brief, UTLX requests that its Cross-Exceptions to the Decision of ALJ Amchan be granted.

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<sup>1</sup> ALJ Amchan’s decision is cited herein as “ALJD \_\_\_\_.” References to the hearing held on November 14, 2018 will be “Tr. \_\_\_\_.” “JX-\_\_\_\_” references are to the joint exhibit. “GC Exh. \_\_\_\_” references are to the General Counsel’s exhibits. “Bd. Exh. \_\_\_\_” references are to the Board Exhibits. “Company Exh. \_\_\_\_” references the other exhibit introduced by UTLX during the hearing.

**B. Statement of Facts**

***a. UTLX Operations***

UTLX is a railroad tank car repair and manufacturing company. [ALJD 2:28-30; Tr. 131]. It operates a facility in Valdosta, Georgia, that is the subject of this dispute. [ALJD 2:28-30; GC Exh. 1(dd)]. Employees at the Valdosta facility clean, repair, coat, and paint railroad tank cars. [Tr. 131]. Due to the nature of this work, the facility contains many hazardous working environments including confined spaces, toxic hazardous environments, and heavy machinery, amongst other potential threats. [*Id.*].

***b. Procedural Background***

This case arises from a dispute between UTLX and the International Association of Sheet Metal, Air, Rail, and Transportation Workers (“SMART”). On February 23, 2017, SMART won a Board-conducted election at the facility and, accordingly, the Board certified SMART as the exclusive bargaining representative of the production and maintenance employees on March 6, 2017. [ALJD 3:5-8; JX-2; Tr. 30-31]. Over the next year, UTLX and SMART engaged in collective bargaining in an attempt to reach an agreement but were unable to do so. [Tr. 28]. Throughout that same time period, SMART filed numerous charges of unfair labor practices against UTLX.<sup>2</sup> [GC Exh. 1(dd)]. Then, in March 2018, UTLX employees signed a petition withdrawing recognition of SMART as their collective bargaining representative.<sup>3</sup> [ALJD 3:7-9; JX-2].

On May 31, 2018, the General Counsel issued a complaint which included case 12-CA-219374.<sup>4</sup> [GC Exh. 1(m)].<sup>7</sup>

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<sup>2</sup> Many of these charges were settled, withdrawn, or dismissed.

<sup>3</sup> There is no allegation that this withdrawal of recognition was unlawful.

<sup>4</sup> Although this Charge was disputed at the hearing before ALJ Amchan, it is not before the Board.

Subsequently, on June 5, 2018, SMART filed yet another petition for a representation election. [ALJD 3:8-10]. On June 22, 2018, a second Board-conducted election was held and SMART lost by a vote of 55 to 54. [ALJD 3:10-15; Bd. Exh. 1(d)].

On June 25, 2018, after the election was complete, SMART filed yet another charge of unfair labor practices (12-CA-222661) [ALJD 5:10-15; Bd. Exh. 1(g)], as well as objections to the election. [ALJD 15-20; Bd. Exh. 1(e)]. In its objections to the election, SMART specifically stated that its objections to the June 22, 2018 election were based on, “outstanding and unresolved ULP’s in Consolidated Complaint (Cases 12-CA-209024, 214382, 216226, 216231, 219374) and a new ULP filed on Jody James regarding his conduct on or about the week of June 18, 2018.” [ALJD 3:45-4:2; Bd. Exh. 1(e)]. The new charge that SMART filed on June 25, 2018, (12-CA-222661) alleged that one of UTLX’s supervisors, Jody James, threatened to retaliate against employees if they joined or supported a union. [GC Exh. 1(g)]. It also alleged that he engaged in surveillance or created the impression of surveillance of employees’ union activities. [*Id.*].

Then on June 28, 2018, General Counsel issued an amended complaint (“Second Amended Complaint”), this time including case 12-CA-220822.<sup>5</sup> The allegations with respect to that Charge (12-CA-220822) was that a UTLX Supervisor, Graham Bridges, told employees there would be harsher discipline because they chose SMART as their exclusive collective-bargaining representative. [GC Exh. 1(p)].

On July 23, 2018, SMART amended Charge 12-CA-222661 regarding Jody James to include the additional allegation that James had interrogated employees about their union activities. [GC Exh. 1(i)]. That Charge (12-CA-222661) was then finally amended a second time on August 3, 2018. At that time, SMART withdrew the previous three allegations from the first

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<sup>5</sup> This Charge had been filed by SMART on May 24, 2018.

amended charge and, for the first time ever, alleged that Jody James confiscated union literature from employees at UTLX back on June 21, 2018. [ALJD 5:18-20; GC Exh. 1(k)].

On August 27, 2018, General Counsel issued yet another amended complaint (“Third Consolidated Complaint”), this time adding case 12-CA-222661 regarding Jody James’ alleged confiscation and case 12-CA-210779. Charge 12-CA-210779 was one that SMART had filed against UTLX back on November 30, 2017, regarding two rules that SMART alleged are overbroad (12-CA-210779). [Bd. Exh. 1(g)]. Specifically, in that Charge, SMART alleged that UTLX maintained and enforced two overbroad work rules in its employee handbook that restrict employees’ rights guaranteed under Section 7 of the Act. [GC Exh. 1(a)].

On September 5, 2018, the Regional Director issued its Report On Objections, Order Directing Hearing and Consolidating Cases, and Notice of Hearing. [Bd. Exh. 1(g)]. In the Regional Director’s Report on Objections, the Region unilaterally added two objections to the objections that SMART previously filed on June 25, 2018. [*Id.*]. The new objections were on the basis of Charge 12-CA-210779 regarding the two rules that SMART alleged were overbroad<sup>6</sup> and the second amended Charge 12-CA-222661 regarding Jody James’ alleged confiscation of Union literature from the break room. [*Id.*].

Finally, on October 26, 2018, General Counsel issued an order severing all other matters and consolidating the four (4) unfair labor practice cases identified above with the representation

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<sup>6</sup> In its objections dated June 25, 2018, SMART did not mention Case 12-CA-210779. The Regional Director noted in his Report on Objections, Order Directing Hearing and Consolidating Cases, and Notice of Hearing that, “[a]lthough Case 12-CA-210779 was not mentioned in the Petitioner’s Objection, it appears that [SMART] likely intended its Objection to encompass all outstanding unfair labor practice charges, even those not included in a complaint at that time.” (Bd. Exh. 1(g)). Before the ALJ, UTLX argued that SMART’s objection regarding the rules was untimely and should not serve as a basis for setting aside the election. Whether SMART’s objection regarding the rules was timely raised was not decided by ALJ Amchan. Ultimately, ALJ Amchan concluded that it was virtually impossible to conclude that the maintenance of the Use of Telephone rule could have affected the election results. [ALJD 8:5-15]. Because no party has filed an exception with respect to that ruling, it is not before the Board and is now the law of the case.

case on SMART's objections (12-RC-221165). The case was tried on November 14, 2018, before ALJ Amchan in Valdosta, Georgia, and on January 11, 2019, ALJ Amchan issued his Decision.

On February 8, 2019, General Counsel filed her exceptions to that Decision. UTLX now files this Brief in Support of its own Cross-Exceptions to the ALJ's Decision. The facts relevant to UTLX's Cross-Exceptions are provided in the following sections.

*c. Use of Telephone Rule*

In March 2010, UTLX put into place a handbook that contained various rules, policies, and procedures applicable to its hourly employees, including a Use of Telephone rule. [3:20-35; JX-1; Tr. 8]. The rule regarding the Use of Telephones says, in its entirety:

Our telephone system needs to be able to handle the heavy load of business calls. For this reason, we ask you to limit incoming and outgoing calls to those that are truly necessary. Cell phones will not be allowed in use during work hours or in work areas at any time unless approved by management.

[*Id.*]. In December 2017, on advice of UTLX's general counsel, UTLX rescinded the Use of Telephone rule and stopped enforcing it. [ALJD 3:36-41; Tr. 135, 146-147]. Since that time, the Use of Telephone rule has not been used to discipline any employees in Valdosta. [Tr. 135, 147].

According to the unrebutted testimony of UTLX management, UTLX's Use of Telephone rule prohibited employees from using their cell phones at times when they were supposed to be working on the shop floor—not when they were on break or at lunch. [Tr. 137]. The rule permitted employees to use their cell phones during breaks and at lunch time. [*Id.*]. While it was in place, UTLX management observed employees on their cell phones during break and at lunch every single day and allowed it. [Tr. 137-138]. According to UTLX's Plant Manager, Bill Giddens, the purpose of this rule was to help ensure employee safety in the hazardous working conditions within the plant. [*Id.*]. Similarly, at the hearing, UTLX Director of Plant Operation, John Bauer, testified

that the Use of Telephone rule permitted employees to use their phones on breaks but otherwise prohibited employees from using phones in working areas during working hours. [Tr. 146].

At the hearing, multiple hourly employees testified that they believed that hourly employees were permitted to use their cell phones during breaks without fear of discipline. [Tr. 29, 80, 219-220]. They also admitted that they regularly did so in front of their supervisors without any fear of discipline. [*Id.*]. Moreover, none of the hourly witnesses were aware of any employee that was disciplined for using their cell phone while on a break. [*Id.*].

In his Decision dated January 11, 2019, ALJ Amchan concluded that the Use of Telephone rule violated Section 8(a)(1) of the Act. [ALJD 7:30-35].

***d. Alleged Comment to Ridge Wallace By Graham Bridges***

Tank car maintenance work at UTLX occasionally requires repairmen to perform what is known as “hot work.” [Tr. 100] “Hot work” includes welding, cutting, or grinding. (*Id.*). Whenever an employee performs hot work on a tank car, he or she is required to sign a hot work permit. [*Id.*].

Ridge Wallace is a former UTLX employee that left the Company around the first week of September 2018. [Tr. 99]. While employed at the Company, he was a Repairman on second shift and his supervisor was Graham Bridges. [Tr. 100].

In early 2018, Ridge Wallace received a 30 day suspension for violating UTLX’s hot work permit policy when he failed to sign the permit. [*Id.*]. Ridge Wallace admitted at the hearing that he was aware of the hot work policy he violated prior to his suspension. [Tr. 104-105]. Although he received the 30 day suspension, UTLX allowed Wallace to serve that suspension over a period of 10 weeks. [Tr. 101]. During that time period, UTLX permitted Wallace to work Mondays and Fridays. [*Id.*].

In its Third Consolidated Complaint, General Counsel alleged that, in late February or early March 2018, Graham Bridges told an hourly employee, Ridge Wallace, that there would be

harsher discipline because the hourly employees chose SMART as their collective-bargaining representative. During the hearing on November 14 2018, three individuals testified regarding this allegation, including Graham Bridges, Ridge Wallace, and Michael Weeks. Each witness' testimony is summarized in the subsections below.

#### *Ridge Wallace's Testimony*

At the hearing, Wallace testified that during his suspension in early March 2018, he had a conversation with Graham Bridges about his ongoing suspension. [Tr. 101]. According to Wallace, during their conversation Bridges said, "if it wasn't for the Union [Wallace] would have only received a written training on the hot work permit instead of a full 30-day suspension." [Tr. 102-103]. Wallace also testified that another hourly employee, Michael Weeks, was present during this conversation with Bridges. [Tr. 103-104]. According to Wallace, Weeks reiterated what Bridges had said, saying, "yes, if it wasn't for the Union, that [Wallace] would have only received the written training." [*Id.*]. Wallace eventually filed a charge of unfair labor practices regarding his suspension; however, he later withdrew that charge. [Tr. 107].

#### *Graham Bridges' Testimony*

Bridges denied ever speaking with Wallace regarding his suspension after it had started. [Tr. 159]. Further, he specifically denied ever having a conversation with Wallace in which he implied that Wallace would have been treated differently if the employees had not voted for SMART to be their collective bargaining representative.[*Id.*]. According to Bridges, it would not have mattered whether SMART was there or not because UTLX policy called for a 30 day suspension for a hot work violation. [*Id.*, Tr. 158-159].

*Michael Weeks' Testimony*

Michael Weeks specifically denied that he ever witnessed a conversation in which Bridges told Wallace that he would not have received a 30 day suspension if it had not been for the union. [Tr. 169]. Weeks further testified that is not something he would expect Bridges to say because the rules clearly state what the punishment will be for a violation. [Tr. 169-170].

*e. Removal of SMART Literature By Jody James*

Jody James is a Repair Supervisor on first shift at UTLX. [ALJD 5:n.5; Tr. 176]. Every Thursday, James conducts a mandatory safety meeting for the employees under his supervision on first shift that usually last approximately 15 minutes, from 8:45 a.m. to 9:00 a.m. [ALJD 4:18-26; Tr. 176-177]. James' Thursday safety meetings are held in the upstairs break room after the employees' break. [*Id.*]. When it is used for trainings, the break room becomes a work area. [Tr. 177].

Prior to the weekly safety meeting on June 21, 2018, Jody James removed all of UTLX's flyers/campaign materials from the upstairs break room. [Tr. 187]. James was under the belief that no campaign materials from either the Company or SMART were to be in the area where the vote was going to be held during the final 24 hours prior to the election. [Tr. 186-187].

On June 21, 2018, 18-22 employees gathered in the breakroom during first shift break. [ALJD 4:21-22]. During that break, TJ Daugherty passed out flyers with campaign-related information from SMART in the breakroom upstairs. [ALJD 4:18-21; GC Exh. 2; Tr. 15-16]. These same SMART flyers were also widely available to employees in other places around the facility. [ALJD 5:1-5; Tr. 188, 212, 219, 226-227, 232, 238]. For instance, there were flyers in the bathroom/locker room that all employees had the opportunity to review. [ALJD 5:1-5; Tr. 201, 212, 219, 227, 238].

Sometime after the break started, James went to the break room to prepare for the safety meeting that would immediately follow the break. [ALJD 4:24-26; Tr. 17, 178]. Prior to the beginning of the meeting, James walked around the tables in the break room and picked up all the flyers on the tables. [ALJD 4:24-26]. Although there some disagreement amongst the employees that testified at the hearing, the majority stated that there were only three (3) flyers on the break room tables when James picked them up.<sup>7</sup> James waited until all the employees finished reading the flyers before he picked them up. [Tr. 199, 218-219]. Everyone in the break room had the opportunity to review the information in the flyers before James picked them up. [Tr. 187-188, 212]. James did not prevent anyone from reading them. [Tr. 199, 200, 211-212, 218, 232, 238]. After he collected the three flyers, James started the safety meeting.<sup>8</sup> [Tr. 186, 193].

At the hearing before ALJ Amchan, James testified that his reasons for collecting the SMART flyers were that the safety meeting was beginning and he was told by UTLX management that there could not be any kind of campaigning (by either UTLX or SMART) in the polling area within 24 hours of the election. [Tr. 186-187]. As ALJ Amchan found, UTLX did not otherwise interfere with SMART's campaign. [ALJD 5:1-5]. Employees wore pro-union t-shirts and it was TJ Daugherty – not UTLX management – that removed the SMART flyers from the employee locker room/bathroom. [*Id.*; Tr. 31-32, 201, 212, 227].

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<sup>7</sup> During the hearing, there was some disagreement amongst those present at the safety meeting on June 21, 2018, regarding how many SMART flyers were in the break room when James gathered them. TJ Daugherty and Zachary Timpson said there were over 20 flyers [Tr. 21, 226]; Joe Queen said there were at least 10 flyers [Tr. 47]; Dalton Corbett said there were 5 or 6 flyers [Tr. 112]; and Jody James, Chad Morgan, Tim McEady, and George Padgett said there were 2 or 3 flyers [Tr. 185-186, 198-199, 209-210, 231]. The weight of the evidence shows that there were 3 flyers in the break room.

<sup>8</sup> TJ Daugherty, Derrell Stone, Dalton Corbett, and Joe Queen also testified that James said SMART had violated federal law by distributing the flyers in the break room. [Tr. 21, 53, 73, 113]. This allegation was expressly denied by James. [Tr. 186]. Nevertheless, this specific allegation is not cited in any charge of unfair labor practice in violation of 8(a)(1) of the Act; nor was it raised in the Third Consolidated Complaint or SMART's objections to the election. Further, there was no testimony by any Company witness that this statement was made. Nevertheless, ALJ Amchan found that he had made this statement. [ALJD 4:n.4].

In his Decision dated January 11, 2019, ALJ Amchan concluded that UTLX, by James, had violated Section 8(a)(1) of the Act by confiscating SMART's flyers in the breakroom. [ALJD 8:25-26].

## **II. QUESTIONS TO BE RESOLVED**

The issues the Board must resolve are as follows:

1. Exceptions 1 through 3:

Did the ALJ err in concluding that UTLX's Use of Telephone rule violated Section 8(a)(1) of the Act?

2. Exceptions 4 through 6:

Did the ALJ err in concluding that UTLX, by Jody James, violated Section 8(a)(1) of the Act by confiscating the union's flyers in the breakroom?

3. Exceptions 7 through 9:

Did the ALJ err in determining that Ridge Wallace's testimony was more credible than Graham Bridges?

## **III. ARGUMENT**

### **A. The ALJ Erred in Concluding that UTLX's Use of Telephone Rule Violated Section 8(a)(1) of the Act. (Exceptions 1 Through 3).**

The Use of Telephone rule does not support the ALJ's finding of a violation of Section 8(a)(1).<sup>9</sup> [ALJD 7:30-35]. In full, that rule provides:

Our telephone system needs to be able to handle the heavy load of business calls. For this reason, we ask you to limit incoming and outgoing calls to those that are truly necessary. Cell phones will not be allowed in use during work hours or in work areas at any time unless approved by management.

[*Id.*] (emphasis added).

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<sup>9</sup> Ultimately, ALJ Amchan concluded that it was virtually impossible to conclude that the maintenance of the Use of Telephone rule could have affected the election results. [ALJD 8:5-15]. Because General Counsel has not filed an exception with respect to that ruling, it is not before the Board and is now the law of the case.

Under the *Boeing* standard, the Use of Telephone rule would not be reasonably read as encompassing Section 7 activity. Reasonable employees read rules aware of their legal rights. *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017). With that in mind, a reasonable employee would clearly view this rule as simply a request to curtail personal calls and avoid distraction when they should be working. Specifically, as to cell phone usage, the restriction is limited to when the employee is supposed to be working, i.e., in accordance with the well-recognized principal that “working time is for work.” *See Ling Prod. Co.*, 212 NLRB 152, 156 (1974)(stating that the concept that nonwork related activities are restricted to nonwork time is an “ordinary and accepted” rule of the employment relationship). Admittedly, the rule uses “work hours”, as opposed to “work time”, but a reasonable employee would read the rule as placing a restriction on when they should be working, not when they are on break. If the rule prohibited cell phone usage at any time during the day (including break time or when employees were off-duty), the underscored portion of the rule above would be redundant. Clearly, the rule deals with two separate concepts: (1) employees should not talk on their cell phones when they should be working and (2) employees should not be using their cell phones in work areas, even if their break has begun.

The reasonableness of the second restriction is self-evident. UTLX’s working environment is not low risk like an office. It is highly hazardous, containing heavy machinery and confined spaces. [Tr. 131]. This is a working environment where it is important that employees remain focused and not distracted by a cell phone. By limiting cell phones in work areas, it made it easier for UTLX to police that the employee was not talking on the phone when they should be working. It does not matter whether the rule “could conceivably be read to cover Section 7 activity” but rather whether “a reasonable employee reading the [ ] rule [ ] would ... construe them to prohibit

conduct protected by the Act.” *Lutheran Heritage*, 343 NLRB 646, 647 (2004) (emphasis added). No such reasonable construction of the Use of Telephone rule would lead to the “conclusion” that it prohibits protected conduct.

Even if the Use of Telephone rule posed a potential adverse impact on Section 7 rights, which it does not, UTLX’s justification for this rule (i.e., employee safety) outweighs any minimal potential impact. *The Boeing Company*, 365 NLRB No. 154 (2017). This is not a case where employees are scattered across a wide geographic area or ordinarily use their phones to communicate with other employees. The employees share a locker room, break room, and production floor. They can talk face to face on various topics including Section 7 concerns. Focusing on the reasonable interpretation of the rule from the perspective of employees, it is clear that any potential impact would be negligible. *See Boeing*, at \*4. All three employees that testified regarding the Use of Telephone rule stated that they believed the rule permitted them to use their phones on breaks and at lunch time. [Tr. 29, 80, 219-220]. They all testified, without contradiction, that they have used their phones on breaks with no fear of reprisal. [*Id.*].<sup>10</sup> Thus, from those employees’ perspectives, there was no potential impact on Section 7 rights when this rule was in effect. Accordingly, this rule does not violate Section 8(a)(1) of the Act.

Further, the fact that UTLX subsequently rescinded the Use of Telephone rule does not lessen the importance of its stated justification for the rule while it was still in effect. ALJ Amchan erred in considering UTLX’s rescission of this rule while weighing the importance of its justification against its potential impact on Section 7 rights. [ALJD 7:39-41]. During the hearing, Director of Shop Operations, John Bauer, testified that he rescinded the rule at the instruction of

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<sup>10</sup> While the Section 8(a)(1) test is an objective one, it is also based upon a totality of the circumstances. *The Roomstore*, 357 NLRB 1690, 1690 n.3 (2011). An objectively reasonable employee would be aware of how other employees treated the Use of Telephone rule (without discipline) and act accordingly.

counsel for UTLX. [Tr. 146]. This rescission was effective across all of UTLX's facilities in multiple states and there is no evidence in the record as to why the rule was rescinded. [Tr. 150-151]. What is more, there is no evidence that this rule was rescinded because UTLX believed it to be in violation of its employees' Section 7 rights. Indeed, UTLX rescinded Use of Telephone rule at the same time it was making wholesale revisions to its policy handbooks across its multiple locations across multiple states. [*Id.*]. Without any evidence as to why the Use of Telephone rule was specifically rescinded, it would be wholly inappropriate for the Board to infer a lack of a legitimate justification for the Use of Telephone rule based upon its rescission.

In conclusion, the Use of Telephone rule did not "chill" any employee's Section 7 rights. There have been two elections held at the facility. On both occasions, the employees signed cards, many employees vigorously campaigned for SMART, and elections were held. UTLX did not discipline any employees for exercising their Section 7 rights under the Use of Telephone rule. Again, a reasonable employee, under a totality of the circumstances test, *The Roomstore*, 357 NLRB 1690, 1690 n.3 (2011). would be aware of these facts.

For these reasons, the Board should grant UTLX exceptions 1, 2, and 3.

**B. The ALJ Erred in Concluding that UTLX Violated Section 8(a)(1) of the Act Through Graham Bridges' Alleged Statements to Ridge Wallace. (Exceptions 4 Through 6).**

ALJ Amchan erred in concluding that sometime in March 2018, at UTLX's Valdosta facility, Graham Bridges told Ridge Wallace that his 30-day suspension would have been a written warning but for the Union. [ALJD 10:11-24]. In his Decision, ALJ Amchan acknowledged that his conclusion regarding Wallace's allegation depended upon credibility determinations and that his credibility determination was not determined by the witness's demeanor. [ALJD 2:n.1]. Ultimately, ALJ Amchan erroneously credited the testimony of Wallace over Bridges. [ALJD 5:26-28]. At the hearing, it was the General Counsel's responsibility to prove by a preponderance

of the evidence that a supervisor made the threatening statement. *Eym King of Missouri, LLC*, 366 NLRB No. 5 (2018). General Counsel did not meet this burden. Wallace's testimony was not more credible than Bridges'.

UTLX offered credible testimony that supports the conclusion that at no point did Graham Bridges impliedly or directly inform Ridge Wallace that his 30-day suspension would have been a written warning if not for SMART. Although Wallace testified that Bridges made this statement, it was General Counsel's burden to prove the credibility of its witnesses. *Id.* In this case, there were several reasons why ALJ Amchan should have found find Bridges' testimony about the alleged incident more credible than Wallace's.

First of all, Wallace was disciplined for 30 days in accordance with UTLX's written policy on hot work violations. [Tr. 100]. Wallace admitted that he was familiar with the hot work permit policy. [Tr. 104-105]. As was testified to by multiple witnesses, that policy provides for no discretion in the length of an employee's suspension. [Tr. 159]. For this reason, it is less likely that Bridges would have made such a statement to Wallace. Moreover, Bridges credibly testified that he actively avoided engaging in conversations about the Union whenever possible. [Tr. 156-157]. Provided Bridges' stance on these matters, it seems highly improbable that he would unilaterally strike up a conversation with Wallace about his suspension and make the alleged remark about the Union. Significantly, neither the Union or General Counsel presented any evidence that the employer had ever issued a mere written warning for a serious safety violation. Thus, it makes no sense that Bridges would state something contrary to written policy and for which there was no past practice.

Secondly, upon reviewing the statement Wallace accredits to Bridges, it is clear that his testimony lacks credibility. Wallace testified that Bridges told him that, if it was not for the union,

he would have only received a “written training.” [Tr. 102-103, 149-150]. When asked what a “written training” is during the hearing, Wallace could only “assume” that this meant a written warning but he was not certain. [Tr. 103]. His uncertainty as to the meaning of the phrase “written training” makes it likely that he had never heard that expression before while working at UTLX for a year and a half. Yet, in response to this alleged confusing statement by Bridges, Wallace testified that he only asked “really?” [*Id.*]. Oddly, he did not ask Bridges what he meant by a “written training.” Wallace also testified that Weeks used the same expression during the same conversation. [Tr. 104]. However, Wallace did not question Weeks what he meant by “written training” even though he did not know.

Lastly, and most importantly, ALJ Amchan failed to appropriately consider the testimony of the only other witness that was supposedly present during Wallace’s alleged interaction with Bridges. [ALJD 5:20-30].<sup>11</sup> During the hearing, Wallace testified that Michael Weeks was the only other hourly employee there. However, General Counsel failed to subpoena Weeks, the single bystander witness for this Charge. This failure should have weighed against the credibility of Wallace. When UTLX called Weeks to testify, he specifically denied that Bridges ever told Wallace that his discipline was harsher because of the Union. [Tr. 169-170]. This is significant. Bystander employees are not presumed to be favorably disposed toward any party. *Tortbitt & Castleman, Inc.*, 320 NLRB 907, 910 fn. 6 (1996). Moreover, Weeks and Bridges both testified that Bridges would avoid discussing union matters with employees. [Tr. 170]. No contrary evidence was introduced by General Counsel and ALJ Amchan failed to mention Weeks’ testimony regarding this incident in his Decision. It makes no sense that Bridges would avoid even making lawful statements about unions only to ignore his training and make unlawful statements.

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<sup>11</sup> Although ALJ Amchan did mention Weeks’ potential motives while testifying with respect to the allegations against Graham Bridges in paragraph 7 of the Third Consolidated Complaint. [ALJD 6:n.6].

For these reasons, the Board should grant UTLX's exceptions 4, 5, and 6.

**C. The ALJ Erred in Concluding that Jody James' Removal of Union Literature Was a Violation of Section 8(a)(1) of the Act. (Exceptions 4 Through 6).**

There is no dispute that James removed the SMART flyers from the break room. But ALJ Amchan erred in concluding that act alone is a violation of Section 8(a)(1). *See Corner Investment Company, LLC*, 28-CA-209739 (2018)(when deciding whether a Section 8(a)(1) violation has been committed, the ALJ must take into account all of the surrounding circumstances). Moreover, merely removing the flyers from the break room was not the basis of the alleged 8(a)(1) violation against UTLX. General Counsel specifically alleged in its Third Consolidated Complaint that UTLX violated Section 8(a)(1) of the Act when, “[o]n or about June 21, 2018, Respondent, by Jody James, at Respondent’s Valdosta facility, in a non-work area and during non-work time, confiscated union literature from employees.” (emphasis added). In reality, James removed three flyers from the breakroom tables right before worktime was starting again and after every employee in the room had the opportunity to review the information. [Tr. 186, 193, 199, 218-219]. Not only did he not confiscate them from employees, but there is no evidence that he removed the flyers because of anti-union animus or in a discriminatory manner. Indeed, there was no preferential treatment given to anti-union literature. *See Mount Hood Medical Center and Oregon Federation of Nurses and Health Professionals*, (1992 WL 1465366).

Again, an alleged Section 8(a)(1) violation requires an analysis of all the surrounding circumstances. *The Roomstore*, 357 NLRB 1690, 1690 fn. 3 (2011). Application of that principal establishes that gathering a grand total of three flyers from the breakroom under the other surrounding circumstances was not unlawful.

The cases that address the confiscation of union literature arise under circumstances in which there is an allegation that management discriminated against the union by treating anti-

union literature less favorably than pro-union literature. *Cmp. Vt Hackney, Inc. & United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC*, JD-27-18, 2018 WL 1897655 (Apr. 19, 2018)(finding Section 8(a)(1) violation after supervisor confiscated pro-union materials stored in employees' tool cabinets, distributed anti-union materials to the same workers, and then permitted them to store anti-union materials in their tool cabinets); *In re North American Refractories Co.*, 331 NLRB 1640 at \*7 (2000) (finding no 8(a)(1) violation for collecting pro-union literature from lunch room because the evidence showed that the company acted with equal zeal in collecting anti-union literature); *Mount Hood Medical Center and Oregon Federation of Nurses and Health Professionals*, (1992 WL 1465366) (finding supervisor violated Section 8(a)(1) of the Act by removing pro-union campaign literature from posting areas while permitting anti-union literature to remain posted and thereby engaging in discrimination); *Vemco, Inc. & Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.(UAW)*, 304 NLRB 911, 927 (1991) (finding an 8(a)(1) violation when supervisor left anti-union material on the table in the break room and put pro-union literature in the trash); *Brooklyn Hospital*, 302 NLRB 785, n.3 (1991) (the Board stated that "because it is unlawful to impose disparate restrictions on prounion literature, we adopt the judge's finding that the Respondent's confiscation of union literature from the employees' work area violated Sec. 8(a)(1) of the Act."); *Jennie-O Foods*, 301 NLRB 305, 338 (1991)(finding that employer failed to destroy other catalogues, newspapers, and other modes of advertisement while selectively removing union solicitations was violation of the Act).

In this case, General Counsel failed to prove that James removed the flyers from the break room in a discriminatory manner. Indeed, there was no evidence presented at the hearing that James gave preferential treatment to anti-union literature or any other literature in the break room

at all. Before Daugherty distributed the flyers during the break on June 21, 2018, James had already removed all of UTLX campaign materials from the breakroom under the belief that there was to be no campaigning in the polling place within 24 hours of the election. [Tr. 186-187]. Removing abandoned material and/or removing materials in a non-discriminatory manner is not unlawful. *In Re North American Refractories*, 331 NLRB 1640, 1643 (2000); *Page Avjet, Inc.*, 278 NLRB 444, 450 (1986). Further, there is no evidence that UTLX permitted other non-union related flyers or other reading materials to remain on the break room tables or even in the break room at all during safety meetings or at other times of day. Simply put, there is absolutely no evidence that UTLX acted differently with respect to the SMART flyers compared to any other type of literature.

James' stated reasons for removing the flyers was because the safety meeting was starting and he believed that there was to be no campaigning (by either UTLX or SMART) in the polling place within 24 hours of the election. [Tr. 186-187]. This intent is not wholly inconsistent with the Board's own regulation 11326.5, which states that all electioneering materials visible from the polls should be removed the day of the election, and Board law that prohibits the distribution of campaign literature during an election. *See Continental Can Co., Inc. (St. Louis, Mo.)*, 80 NLRB 785, 786 (1948) (finding that distribution of handbills within the "no electioneering" location was objectionable election conduct). Nevertheless, James did not gather up the flyers until the break was ending and work time was about to begin. Further, he made no effort to prevent a single employee from reading the SMART materials during the break. Thus, under the totality of the circumstances, the ALJ erred in concluding that James' conduct violated Section 8(a)(1) of the Act. The Board should grant UTLX's exceptions 7, 8, and 9.

#### IV. CONCLUSION

For the foregoing reasons, UTLX respectfully urges the Board to grant all of UTLX's Cross-Exceptions to ALJ Amchan's Decision dated January 11, 2019.

Dated: February 22, 2019

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on February 22, 2019, the foregoing Union Tank Car Company's Brief In Support of its Cross-Exceptions to the Decision of the Administrative Law Judge was served as follows:

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